91-247

Supreme Court, U.S.
FILED
MAR 28 1991
OFFICE OF THE CLERK

No. 91-_____

In The

Supreme Court of the United States

October Term, 1991

—o—

LOCAL UNION 375, PLUMBERS INTERNATIONAL UNION OF AMERICA, AFL-CIO; J.L. ARSENAULT, an individual; POLITICAL, EDUCATIONAL LEGISLATIVE, CHARITY AND DEFENSE FUND OF PLUMBERS LOCAL UNION 375, AFL-CIO, a/k/a VOLUNTARY FUND

Petitioners,

vs.

ELIZABETH H. DOLE, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

PETITION FOR WRIT OF CERTIORARI

—o—

William K. Jermain
Jermain, Dunnagan & Owens, P.C.
3000 A Street, Suite 300
Anchorage, Alaska 99501
(907) 563-8844

Counsel for Petitioners

QUESTION PRESENTED FOR REVIEW

Did the Petitioner establish a *prima facie* showing of first amendment infringement in response to a United States Department of Labor Subpoena seeking the disclosure and identity of its members and contributors?

PARTIES TO THE PROCEEDING

Counsel of Record for Petitioners certify that the only persons who have an interest in the outcome of this case are all parties to the above-captioned matter. These representations are made to enable the Justices of the Court to evaluate possible disqualification or recusal.

1. The plaintiff is Elizabeth H. Dole*, Secretary of Labor, United States Department of Labor.

2. The defendants named in the original action are:

A. Local Union 375, Plumbers International Union of America, AFL-CIO;

B. Political, Educational Legislative, Charity and Defense Fund of Plumbers Local Union 375, AFL-CIO a/k/a Voluntary Fund.

C. J. L. Arsenault; and

D. Yvonne Cox.

* Elizabeth Dole was substituted as plaintiff/appellee for William Brock pursuant to Fed.R.App.P. 43(c) on June 28, 1990.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF CASE	3
REASONS FOR GRANTING THE WRIT	8
I. The Ninth Circuit Decision Imposes an Insurmountable Burden of Proof in Establishing a *Prima Facie* Showing of First Amendment Infringement	8
A. *Petitioners Established a Prima Facie Showing of First Amendment Infringement by Demonstrating a Decline in Membership Contributions as a Direct Result of the Government's Investigation*	10
B. *The Ninth Circuit Decision is in Conflict With a Second Circuit Decision Also Involving First Amendment Concerns*	14
II. Conclusion	17

TABLE OF AUTHORITIES

CASES Page(s)

Brock v. Local 375, Plumbers International Union of America, AFL-CIO, 860 F.2d 346 (9th Cir. 1988) 3,8,9

Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982) 9,13

Buckley v. Valeo, 424 U.S. 1 (1976) 9,17

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) 13

Federal Election Commission v. Machinists Non-Partisan Political League, 655 F.2d 380 (D.C. Cir 1981) 15

Federal Election Committee v. LaRouche Campaign, 817 F.2d 233 (2nd Cir. 1987) 14,15,16

First National Bank, Englewood, Colorado v. U.S., 701 F.2d 115 (10th Cir. 1983) 13

In re: Grand Jury Proceedings, 842 F.2d 1229 (11th Cir. 1988) 9

Local 1814, International Longshoremen's Association v. Waterfront Commission of New York Harbor, 667 F.2d 267 (2nd Cir. 1981) 14

McLaughlin v. Service Employees Union, AFL-CIO, Local 280, 880 F.2d 170 (9th Cir. 1985) 3

NAACP v. Alabama ex rel Pultecson, 357 U.S. 449 (1958) 12

O'Neal v. United States, 601 F. Supp. 874 (N.D. Ind. 1985) 9

Shelton v. Tucker, 364 U.S. 479 (1960) 17

United States v. Citizens State Bank, 612 F.2d 1091 (8th Cir. 1980) 14,15

STATUTES AND CONSTITUTIONAL PROVISIONS

United States Constitution

First Amendment 1

Fourteenth Amendment 2

United States Code

15 USC § 49 3

28 USC § 1331 3

28 USC § 1343 3

29 USC § 402 et seq. 5

29 USC § 521(b) 3

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals is a published Opinion and is printed in Appendix A, *infra*, App. 1. The Order of the United States District Court, District of Alaska, is printed in Appendix B, *infra*, App. 19.

JURISDICTION

The Opinion of the United States Court of Appeals, Ninth Circuit, was filed on December 28, 1990. Jurisdiction of the Supreme Court is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

FIRST AMENDMENT

Freedom of religion, of speech and of the press. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the government for a redress of grievances.

FOURTEENTH AMENDMENT

§ 1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On May 8, 1987, the Secretary of Labor filed a Petition to Enforce Subpoenas, Ad Testificandum, and Duces Tecum. The subpoenas seek the identity of contributors and members of the Political, Educational, Legislative, Charity and Defense Fund of Local Union 375, Plumbers International Union of America, AFL-CIO, aka Voluntary Fund. By order dated July 17, 1987, the United States District Court, District of Alaska, ordered enforcement of the subpoenas. The district court exercised jurisdiction over the government's Petition for Enforcement pursuant to 15 USC § 49, 29 USC § 521(b) and 28 USC § 1331 and § 1343. An order of a district court enforcing agency subpoenas constitutes a final order under 28 USC § 1241 and is therefore appealable. *McLaughlin v. Service Employees Union, AFL-CIO, Local 280*, 880 F.2d 170, 173 (9th Cir. 1985). Accordingly, Petitioners appealed the district court's order to the United States Court of Appeals for the Ninth Circuit.

On appeal, the Ninth Circuit Court of Appeals reversed the decision of the district court. *Brock v. Local 375, Plumbers International Union of America, AFL-CIO*,

860 F.2d 346 (9th Cir. 1988). The case was remanded to the district court in order to determine whether Petitioners could establish a *prima facie* showing of arguable first amendment infringement. Id.

By order dated December 6, 1989, the district court again ordered enforcement of the subpoenas on the ground that Petitioners failed to make a sufficient showing of first amendment infringement. The Ninth Circuit Court of Appeals affirmed the district court's order in a published decision filed December 28, 1990. The facts material to the consideration of the question presented are set out below.

The Secretary of Labor instituted this action in the district court to enforce three subpoenas issued in connection with a Compliance Audit Program audit of Local Union 375, Plumbers International Union of America, AFL-CIO (hereinafter "Union"). The subpoenas seek production of documents and testimony relating to the Political, Educational, Legislative, Charity and Defense fund (hereinafter "Fund"). The subpoenas encompass documents that would reveal the names of Fund contributors. The Fund is used for scholarships, charitable contributions and political purposes. Moneys received by

the Fund are based upon voluntary contributions. No union dues or assessments are used to generate income for the Fund. Only 5% of the contributions are from members of the Union.

The Fund is administered by J. L. Arsenault, who is also the Business Manager of the Union. In his capacity as administrator, Mr. Arsenault is solely responsible for use of Fund moneys. He does not consult with union membership or the union executive board regarding Fund expenditures. To further the interest of Fund members, the Fund makes contributions to candidates for local and state offices.

The Fund is audited annually by the accounting firm of Lockitch, Clements & Rice of Seattle, Washington. The firm specializes in audits of labor organizations and Taft-Hartley Trust Funds. Based upon the firm's opinion, no reports concerning the Fund were filed with the DOL because it was not a "Union" Fund within the meaning of the Labor-Management Reporting & Disclosure Act (LMRDA), 29 U.S.C. § 402 et seq.

During the course of the United States Department of Labor ("DOL") audit of the Union, investigators discovered records which indicated that two checks were

written to the Fund from the Union's general fund checking account. Check #21096 was dated February 25,1983 in the amount of $6,000.00, and check #22041 was dated December 27, 1983, in the amount of $500.00. On September 22, 1986, in response to questions by DOL officials about these transactions, William K. Jermain, attorney for the Fund, explained that the $6,000 check was reimbursement to the Fund for a deposit made on a fishing trip in 1982, and the $500 was reimbursement made on a relief map as a gift to the former governor of the State of Alaska.

On September 26, 1986, Attorney Jermain also voluntarily produced copies for inspection by the DOL of checks drawn on the Fund account which represented all transactions between the Fund and the Union's general fund. These records reflected that on January 22, 1981, the Union loaned $10,000 to the Fund. The loan was repaid to the Union on November 4, 1981. Another loan in the amount of $10,000 was similarly made to the Fund from the Union on February 23, 1981. This loan was also repaid to the Union on February 25, 1983. The DOL was allowed to review all of these records. The DOL has

never alleged that any of these transactions violated the LMRDA.

The DOL subsequently served subpoenas ad testificandum on J. L. Arsenault and Yvonne Cox. Yvonne Cox is the bookkeeper of the Fund's records. She is also bookkeeper for the Union. Ms. Cox keeps the Funds' records in a separate location and is paid out of the Fund account for her services performed for the Fund. A subpoena duces tecum was also served on J. L. Arsenault for production of the Fund's records. The subpoenas duces tecum seek:

> All records pertaining to the subject as identified above for the period January 1, 1982 to the present. Said records to include but not be limited to: canceled checks; check stubs; bank statements; passbooks; deposit slips and deposit items; all receipts and disbursement records; vouchers; invoices; minutes of meetings; any and all correspondence relating to the operation of the fund; copies of audit reports; governing documents; articles of incorporation; reports furnished to regulating and or enforcement authorities to include local, state or federal, etc. Included in this request are records of the above named fund held at the 1st National Bank of Anchorage, account number 25106592, and any and all other accounts for the fund held at that bank or any other

institution of depository to include the contents of safe deposit boxes.

In seeking enforcement of the subpoenas, the DOL therefore attempts to compel the disclosure of documents that would reveal the identity of Fund contributors and members.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT DECISION IMPOSES AN INSURMOUNTABLE BURDEN OF PROOF IN ESTABLISHING A *PRIMA FACIE* SHOWING OF FIRST AMENDMENT INFRINGEMENT

The Ninth Circuit Court of Appeals required Petitioners to demonstrate a *prima facie* showing that enforcement of the subpoenas will result in (1) harassment of new members, or (2) other consequences which objectively suggest an impact on, or "chilling" of members' associational rights. *Brock v. Plumbers Local 375, Plumbers International Union of America*, 860 F.2d 346, 350 (9th Cir. 1988).

While this test appears to be well established, courts have indeed been troubled with the precise degree

of the evidence required to establish a *prima facie* showing. *Brock* 860 F.2d at 350, fn.1. The United States Supreme Court has noted that the "evidence offered need show only a reasonable probability that the compelled disclosure . . . will subject [contributors] to threats, harassment, or reprisals from either governmental official or private parties." *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), quoted in *Brock*, 860 F.2d at 350. *See also, Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982); *In re: Grand Jury Proceedings*, 842 F.2d 1229, 1235 (11th Cir. 1988); *O'Neal v. United States*, 601 F. Supp. 874, 879 (N.D. Ind. 1985).

In *Buckley*, the Supreme Court admonished that lower courts should not place "unduly strict requirements" on parties seeking to assert first amendment rights. The Supreme Court was cautious and sensitive of placing an insurmountable burden of proof upon parties as it would further curtail the parties' assertion of their constitutional rights. The constitution guarantees rights for all citizens regardless of the ability or inability to acquire an unbendable objectional defense. Otherwise, courts would be forcing parties to forfeit the very privacy and freedom of association that the constitution seeks to protect.

The Ninth Circuit Court of Appeals failed to apply the "reasonable probability" standard in determining whether Petitioner established a prima facie case of arguable first amendment infringement. Rather, the appellate court imposed unduly strict requirements upon the Petitioner and impliedly required that in the absence of any evidence or testimony from Fund members themselves, a *prima facie* showing could not be met.

A. Petitioners Established a Prima Facie Showing of First Amendment Infringement by Demonstrating a Decline in Membership Contributions as a Direct Result of the Government's Investigation

The Affidavit of Lenny Arsenault, the auditor reports, and the press articles that were presented to the district court and the Court of Appeals affirmatively established an objective and articulable basis to conclude that the Fund's contributors have been discouraged and have withdrawn their contributions as a direct result of the DOL investigation. The objective and articulable facts presented to the lower court are more than sufficient to satisfy a "reasonable probability" of arguable first amendment infringement.

The evidence conclusively demonstrates that there was a significant showing of membership withdrawal and the discouragement of new members as a result of the DOL investigation. For example, in 1985, the Fund received $62,229 in income and in 1988 the Fund received $8,092 in income, a difference of $54,137. The Arsenault Affidavit established that this decline of the contributions to the Fund is solely attributable to the government's investigation.

The press articles published May 12, 1987, about the DOL's investigation of Lenny Arsenault, related the fact that the DOL had issued a subpoena to acquire the records of the Fund. These records contain the names of the contributors of the Fund and the respective amounts of their contributions. These individuals have a right to non-disclosure of their names and amounts of contributions in the absence of any compelling governmental interests, because enforcement of the subpoenas has a "chilling" effect on the members' associational rights. This chilling impact is manifested by the decline in membership contributions because of the government investigation.

Furthermore, the press articles discussed the impeachment hearings of ex- Alaska Governor Bill Shef-

field with inferences that the Fund had contributed to his campaign. The threat of disclosure by governmental officials results in a chilling effect on the Fund's members' right to continue to contribute without subjecting themselves to governmental scrutiny.

The Affidavit of Lenny Arsenault, the auditor reports, and the press articles provide objective and articulable facts of the "chilling" of the contributors' associational rights. Petitioners submit that this showing exceeds the Supreme Court's standard that the evidence need only show a "reasonable probability" of a chilling effect.

The Ninth Circuit Court of Appeals decision implies that absent affidavits or declarations from members or potential members of the Fund, a *prima facie* case of first amendment infringement cannot be established. Yet, to require affidavits or declarations of Fund contributors or members would defeat the very right to freedom of association they seek to protect. *NAACP v. Alabama ex rel Pultecson*, 357 U.S. 449 (1958). Any affidavits of Fund contributors would disclose their identity and amounts of contributions, thereby subjecting themselves to governmental investigation. The Ninth Circuit's Opinion places the

Fund's contributors in the ultimate "Catch-22" situation, and raises an insurmountable burden of proof of an arguable *prima facie* showing of first amendment infringement.

It is well established that the identities of members of associations must remain private if the identifications would chill the members' associational rights. The Supreme Court has even gone as far as allowing associations to assert the first amendment right to freedom of association when the governmental action is directed at a third-party.[1] *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975). First amendment rights that are "chilled" by third-party records also protect the identity of individual members of the association. *First National*

---

[1] The Supreme Court has further stated that "the fact that some or even many recipients of campaign expenditures may not be exposed to the risk of public hostility" does not detract from the serious threat to the exercise of First Amendment rights of those who are so exposed. *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 99 (1982). The Ninth Circuit Court of Appeals attempted to distinguish *Brown* by noting that the Fund, while political, did not claim to be politically unpopular or weak. Appendix A, App. 14. Petitioner submits that every organization, whether popular or unpopular, is protected by the freedom of association.

Bank, Englewood, Colorado v. U.S., 701 F.2d 115 (10th Cir. 1983); *Local 1814, International Longshoremen's Association v. Waterfront Commission of New York Harbor*, 667 F.2d 267 (2nd Cir. 1981); *United States v. Citizens State Bank*, 612 F.2d 1091 (8th Cir. 1980). These decisions represent the broad and liberal scope that the right to freedom of association must be given by the lower courts. However, the Ninth Circuit Court of Appeals imposed unduly restrictive requirements upon the Fund's contributors even though they were directly affected by governmental intrusion.

B. The Ninth Circuit Decision is in Conflict With a Second Circuit Decision Also Involving First Amendment Concerns

The Court of Appeals for the Second Circuit has recognized that the usual deference provided to the administrative agency is not appropriate when a case involves first amendment infringements. "Protection of the constitutional liberties of the target of the subpoena calls for a more exacting scrutiny of the justification offered by the agency." *Federal Election Committee v. LaRouche Campaign*, 817 F.2d 233, 234 (2nd Cir. 1987); *accord,*

Federal Election Commission v. Machinists Non-Partisan Political League, 655 F.2d 380, 386-88 (D.C. Cir 1981). In *LaRouche*, the Second Circuit held:

> The district court erred in holding essentially that because the campaign had not made a showing that disclosure of those associated with it was likely to result in reprisals, harassment, or threats, . . . (citations omitted), the FEC needed only to show the information sought was "relevant to the FEC investigation" 644 F.Supp. at 123. While it is true that the campaign's failure to make such a record means that the subpoenaed material is not immune from disclosure, the investigation and the subpoena nevertheless tread in an area with first amendment associational concerns. When such concerns appear, an administrative agency is not automatically entitled to obtain all material that may in some way be relevant to a proper investigation. Rather, where disclosure sought will compromise the privacy of individual political associations, and hence risks a chilling of unencumbered associational choices, the agency must make some showing of need for the material sought beyond its mere relevance to a proper investigation. (emphasis supplied)

817 F.2d at 234-35 *accord United States v. Citizens State Bank*, 612 F.2d 1091, 1093 (8th Cir. 1980).

The Second Circuit's decision in *LaRouche* is in direct conflict with the Ninth Circuit's decision involving the Petitioners. The Ninth Circuit's decision, unlike *LaRouche*, entirely failed to recognize that "different considerations come into play when a case . . . implicates first amendment concerns . . . [p]rotection of the constitutional liberties of the target of the subpoenas calls for a more executing scrutiny . . ." 817 F.2d at 234. Unlike the Second Circuit Court of Appeals, the Ninth Circuit Court of Appeals did not require a minimal showing of relevancy with respect to the government's need to compel the disclosure of the identity of Fund members. Under *LaRouche*, Petitioners are entitled to assert their freedom of association concerns in response to the DOL investigation. As in *LaRouche*, the government has failed to demonstrate "that there are governmental interests sufficiently important to outweigh the possibility of infringement [of the exercise of the first amendment rights]." 817 F.2d at 235, *quoting Buckley v. Valeo*, 424 U.S. at 66, 96 S.Ct. at 657.

II. CONCLUSION

The right of association is a basic constitutional freedom that "lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). "Unduly strict requirements of proof could impose a heavy burden" on an individual and would impede a basic constitutional right. *Buckley v. Valeo*, 424 U.S. 1, 71 (1976). Enforcement of the DOL subpoenas by the Ninth Circuit Court of Appeals without allowing Petitioners to raise their first amendment concerns violates the constitutional guarantee of freedom of association. In order to cure the Ninth Circuit Court of Appeals imposition of "unduly strict requirements of proof" in establishing a *prima facie* showing of arguable first amendment infringement, Petitioners respectfully request the Supreme Court grant their Petition for Certiorari.

JERMAIN, DUNNAGAN & OWENS, P.C.

By William K. Jermain

APPENDIX A

ELIZABETH DOLE[1], Secretary of Labor, United States Department of Labor, Plaintiffs-Appellees,

v.

LOCAL UNION 375, PLUMBERS INTERNATIONAL UNION OF AMERICA, AFL-CIO; J.L. Arsenault, an individual; Political Educational Legislative, Charity and Defense Fund of Plumbers Local Union 375, AFL-CIO, a/k/a Voluntary Fund, Defendants-Appellants.

No. 90-35111.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted Nov. 6, 1990.

Decided Dec. 28, 1990.

Secretary of Labor filed petition to enforce subpoenas for investigation of political, educational, charity and

---

[1] Elizabeth Dole was substituted as plaintiff\appellee for William Brock pursuant to this court's order of June 28, 1990. Fed. R. App. P. 43(c).

defense fund under Labor-Management Reporting and Disclosure Act. The United States District Court for the District of Alaska, H. Russel Holland, Chief Judge, enforced subpoenas. Union and fund appealed. The Court of Appeals, 860 F.2d 346, reversed and remanded. On remand, the District Court again enforced subpoenas and appeal was taken. The Court of Appeals, Tang, Circuit Judge, held that fund failed to establish that enforcement of subpoenas would harm its contributors' First Amendment associational rights.

Affirmed.

1. **Administrative Law and Procedure**
Westlaw Key ("Key") 681

Order of district court enforcing agency subpoenas was final, appealable order. 28 U.S.C.A. § 1291.

2. **Constitutional Law** Key 91

Federal Civil Procedure Key 465

Union fund failed to establish that enforcement of Department of Labor subpoenas seeking financial records including names of fund contributors would harm contributors' First Amendment associational rights; fund neither established causal nexus between threatened enforcement of subpoenas and decline in contributions nor did it tender

evidence supporting well-founded fear that disclosure of its contributor list to narrow group of Department employees would discourage membership or substantially frustrate its operations. U.S.C.A. Const.Amend. 1.

3. **Constitutional Law** Key 82(6)

Federal Civil Procedure Key 1271

Subjective fear of reprisal is insufficient to invoke First Amendment protection against discovery disclosure requirement. U.S.C.A. Const.Amend. 1.

William K. Jermain, Jermain, Dunnagan & Owens, Anchorage, Alaska, for defendants-appellants.

Robert D. Kamenshine, U.S. Dept. of Justice, Washington, D.C., for plaintiffs-appellees.

Appeal from the United States District Court for the District of Alaska

Before TANG, O'SCANNLAIN and LEAVY, Circuit Judges. TANG, Circuit Judge:

INTRODUCTION

Acting pursuant to its authority under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § § 401 *et seq.* ("LMRDA"), the Department of Labor commenced in 1986 a routine compliance audit of Local Union 375, Plumbers International Union of America, AFL-CIO ("the Union"). In the course of this

audit, the Department uncovered a series of questionable financial transactions between the Union and the Political, Educational, Legislative, Charity and Defense Fund of the Union ("the Fund").

Specifically, the Department's inquiries revealed that the Union made two interest free loans of $10,000 each to the Fund in the first two months of 1981. The Department further discovered two reimbursements made by the Union to the Fund for advances the Fund apparently made on behalf of the Union. In February 1983, the Union repaid the Fund $6,000 for a deposit is had previously paid to secure a Union fishing trip. In December 1983, the Union refunded $500 that the Fund had advanced for a relief map given as a gift to the Governor of Alaska. The Department also learned that the sole administrator of the Fund, J.L. Arsenault, was the Secretary-Treasurer of the Union. The Union's bookkeeper, Yvonne Cox, also served as the Fund's bookkeeper.

Inconsistencies in the Fund's identification of itself further piqued the Department's interest. The Fund had persistently refused to register as a "group" with the Alaska Public Offices Commission, insisting that it was a "labor organization" instead. At the same time, the Fund

failed to file reports with the Department of Labor, claiming it was not a "union fund" within the meaning of the LMRDA. No constitution, bylaws, articles of incorporation, trust agreement, or other organic documents pertaining to the Fund have ever been found.

At this point, the Department determined that it would further investigate the propriety of the Fund's refusal to file as a "union fund" under the LMRDA. The Department issued a number of subpoenas to the Fund, Mr. Arsenault, and Ms. Cox, seeking financial records detailing the Fund's operations, including the sources of its funding. The parties do no dispute that the subpoenas encompass documents that would reveal the names of Fund contributors.

When Mr. Arsenault and Ms. Cox refused to comply with the subpoenas on first amendment grounds, the Department initiated an action to enforce the subpoenas on first amendment grounds, the Department initiated an action to enforce the subpoenas in federal district court in Alaska. The district court's July 1987 order, rejecting the Fund's first amendment claims and enforcing the subpoenas, occasioned the first appeal to this court. In October 1988, this court reversed the district court's order

of enforcement and remanded for a hearing to determine whether "a prima facie showing of arguable first amendment infringement" could be shown. *Brock v. Local 375, Plumbers Int'l Union of America*, 860 F.2d 346, 349 (9th Cir.1988)(quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir.1983)). We instructed that, in order to prevail on remand, the Fund would have to "demonstrate that enforcement of the subpoenas will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of the members' associational rights." 860 F.2d at 350. Once the Fund made such a showing, the burden would shift to the Department to demonstrate that the subpoenas were "rationally related to a compelling governmental interest" and were the least restrictive means of obtaining the needed information. *Id.*

When invited on remand to present a *prima facie* case of first amendment infringement, the Fund introduced an affidavit by J.L. Arsenault, a report from the company's auditors documenting a rather precipitous

decline in the Fund's contributions,[1] and two newspaper clippings discussing the Department's investigation.[2] The district court ruled that this evidence did not create a *prima facie* case of unconstitutional entrenchment on associational rights. It held that the Fund had failed to follow the Ninth Circuit's admonition that its evidence of a first amendment chill be objective. The court characterized Mr. Arsenault's affidavit as "nothing more than an opinion--his conclusion." *Brock v. Local 375*, No. A87-206 Civil, Order a 7, 1989 WL 201631 (D. Alaska Dec. 7, 1989)(Order Enforcing Subpoenas, Again) ("Order"). The court further noted that "[c]onspicuously absent from Mr. Arsenault's affidavit are any articulable facts" linking the decline in revenues with the Department's efforts to subpoena contributor lists. Order at 8. The lack of any membership data or evidence supporting a well-founded

---

[1] The auditor's report showed voluntary contributions in the amount of $24,458 in 1985; $27,079 in 1986; $1,405 in 1987; and $1,995 in 1988.

[2] The parties and court had previously agreed to resolve the first amendment question on the basis of affidavits and depositions, rather than through an evidentiary hearing.

fear of harassment or reprisals reinforced the court's ultimate conclusion:

> The showing of the union and the Fund is conclusory and speculative. There is no factual, objective demonstration that there has been or is likely to be harassment or membership withdrawal because of the enforcement of the subpoena. Undeniably, there has been a change in the Fund, but defendants have simply left the court to speculate about why that change took place.

Order at 9.

Finding no *prima facie* evidence of a first amendment violation, the district court found it unnecessary to inquire into the question of whether the information sought by the subpoenas was rationally related to a compelling governmental interest, and entered an order enforcing the subpoenas. Shortly thereafter, the Fund noticed its appeal to this court.

JURISDICTION AND STANDARD OF REVIEW

[1] An order of a district court enforcing agency subpoenas represents a final order within the meaning of 28 U.S.C. § 1291 and is thus appealable. *McLaughlin v. Service Employees Union, AFL-CIO, Local 280*, 880 F.2d 170, 173 (9th Cir.1989).

We review *de novo* the question whether the evidence presented constitutes a *prima facie* case of first amendment infringement. *See Carreras v. City of Anaheim*, 768 F.2d 1039, 1042 n. 2 (9th Cir. 1985).

DISCUSSION

I. *The Fund's Prima Facie Showing*

[2] The court's earlier opinion in this case outlined for the Fund the type of showing it would have to make in order to prevail on remand:

> This *prima facie* showing requires appellants to demonstrate that enforcement of the subpoenas will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of the members' associational rights.

Brock, 860 F.2d at 350. We then noted that courts generally have demanded the presentation of "objective and articulable facts, which go beyond broad allegations or subjective fears." *Id.* at 350 n. 1.

Brock's prima facie test has two tiers. First, the Fund must demonstrate a causal link between the disclosure and the prospective harm to associational rights. Second, the Fund must demonstrate that it is the type of

association where exposure could incite threats, harassment, acts of retribution, or other adverse consequences that could reasonably dissuade persons from affiliating with it. The evidence presented by the Fund to the district court did neither.

A. *The Causal Nexus*

The Fund's documentation--the affidavit, auditor's report, and news articles--fail to establish that enforcement of the subpoenas will cause harm to its contributors' associational rights. The auditor's report simply records a decrease in annual contributions. No causal explanation for the decline is tendered. Similarly, the news articles simply report the fact of the government's investigation, without delving into the possible impact of the investigation on membership. Only the last paragraph of Mr. Arsenault's affidavit touches upon the question of causation. That paragraph reads, in pertinent part:

> That as a direct result of the action of the U.S. Department of Labor in attempting to gain contribution lists, the Voluntary Fund has, for all intents and purposes, ceased to exist. Little or no contributions have been received. . . . Contributions to the Fund have virtually dried up because of the controversy surrounding the Funds and particularly the potential disclosure of the names

> of individuals desiring to support the goals of the Voluntary Fund. . . . For all intents and purposes, because of the actions of the U.S. Department of Labor in seeking the records of this Fund, the Fund has ceased to exist as a viable entity for the purposes of making political, educational, legislative, charitable, and union goal-oriented expenditures.

While the affidavit thus discusses the issue of causation, it proffers no "objective and articulable facts" demonstrating that enforcement of the subpoenas will impact upon first amendment rights. The statements are wholly conclusory. Indeed, the affidavit suggests that the decline in contributions was caused (at least in part) by publicity surrounding the investigation, rather than the threat of subpoena enforcement *per se*. To the extent there has been a "chill" in affiliations with the Fund, the affidavit provides the court no assistance in allocating responsibility for that chill between the general investigation (the propriety of which the parties do not contest here) and the particular threat of disclosure of contributors' names through the subpoenas.

The district court correctly observed, moreover, that the affidavit does not even allege a reduction in membership. For all this affidavit shows, membership

could have remained stable or even increased throughout the course of the investigation. The Fund's evidence shows only that monetary contributions have declined.[3]

Case law amply demonstrates the inadequacy of such a showing. Under quite similar circumstances, this court rejected a union's attempt to defend against a Department of Labor subpoena with an affidavit containing only "[b]are allegations of possible first amendment violations." *McLaughlin*, 880 F.2d at 175. Echoing *Brock*, this court instructed that "[t]he record must contain 'objective and articulable facts, which go beyond broad allegations or subjective fears.'" *Id.* (quoting *Brock*, 860 F.2d at 350 n. 1). Because the affidavit submitted by the Union argued, rather than evidenced, a chill on association, the court concluded that a *prima facie* case had not been presented.

In *St. German of Alaska Eastern Orthodox Catholic Church v. United States*, 840 F.2d 1087 (2nd Cir. 1988), the Church opposed enforcement of IRS summonses on first

---

[3] Indeed, the Fund's own evidence attributes the drop in contributions to an economic downturn resulting in unemployment for its contributors.

amendment grounds.[4] In an affidavit, the head of the church, like Mr. Arsenault, asserted that the Church had suffered from a significant drop in the number of contributions since the commencement of the IRS's investigation. *Id.* at 1093. The Second Circuit held that the Church had not presented a *prima facie* case of first amendment infringement because such allegations "[did] not establish that the IRS investigation is the cause of these problems." *Id.* As in this case, the fall-off in the Church's donations could have as easily been attributed to publicity surrounding the investigation. *Id.*

Similarly, in *O'Neal v. United States*, 601 F.Supp. 874, 880 (N.D.Ind. 1985), *cited in Brock*, 860 F.2d at 350, the district court held that conclusory affidavits failed to prove a *prima facie* case of first amendment infringement because they did not explain in any detail "how the summons has actually impacted (or threatens to impact)" on the organization's activities. *Id.*

Finally, *Master Printers of America v. Donovan*, 751 F.2d 700, 705 (4th Cir. 1984), *cert. denied*, 474 U.S. 818,

---

[4] The church raised both freedom of religion and freedom of association grounds.

106 S.Ct. 63, 88 L.Ed.2d 52 (1985), stands for the proposition that a *prima facie* case of infringement on associational rights cannot rest upon "casual reference[s]" to, let alone unarticulated implications of, a decline in membership. A *prima facie* showing entails, instead, "a careful documentation" of membership decline--something wholly lacking from the Fund's evidence. *Id.*

The Fund's evidence demonstrating a decline in contributions coincident with the start of the Department's investigation, without more, does not satisfy the first tier of the Brock test. Documenting a result does not prove its cause.

B. *Evidence of Harassment*

The Fund's evidence is equally devoid of objective facts indicating a well-founded fear of threats, harassment, or other adverse consequences if its contributor list is disclosed. Neither the auditor's report nor the news articles even speaks to this issue. The affidavit, moreover, contains no allegations of, let alone facts demonstrating, prior or threatened harassment of members by the government or the public. Although the Fund claims to be political, it does not claim to be politically weak, politically unpopular, or politically disadvantaged. *Cf.*

Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 99-100, 103 S.Ct. 416, 423-24, 74 L.Ed.2d 250 (1982); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63, 78 S.Ct. 1163, 1171-72, 2 L.Ed.2d 1488 (1958).

[3] The factual gaps in the Fund's evidence are fatal to its case. A subjective fear of reprisal is insufficient to invoke first amendment protection against a disclosure requirement. *See Buckley v. Valeo*, 424 U.S. 1, 71-72, 96 S.Ct. 612, 659-60, 46 L.Ed.2d 659 (1976); *Brock*, 860 F.2d at 350 n. 1; *In re Grand Jury Proceeding*, 842 F.2d 1229, 1235 (11th Cir. 1988).

The Fund, in essence, equates the mere fact of disclosure with a first amendment chill. The cases in which the Supreme Court has recognized a threat to first amendment associational rights, however, have consistently required more than an argument that disclosure leads to exposure. Parties like the Fund must demonstrate that exposure either is itself inherently damaging to the organization or will incite other consequences that objectively could dissuade persons from affiliating with the organization. In *Brown v. Socialist Workers Comm.*, 459 U.S. at 98-100, 103 S.Ct. at 423-24, the Supreme Court found a first amendment violation where disclosure of

names in the past had provoked hate mail, property destruction, harassment by government officials, and employment termination. Likewise, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 1172, an infringement of first amendment rights was found because the NAACP showed that "on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."

The Fund not only failed to demonstrate its members' susceptibility to harassment, but also neglected to explain how its subjective fear of reprisals could be realized, given that Department policy protects the subpoenaed information from public disclosure. *See McLaughlin*, 880 F.2d at 175. The government will disseminate the information only on a "need to know" basis. *Id.* As a result, the Fund needed to establish that its members legitimately feared retribution by those few governmental employees who would have access to its records. No such showing has been made in this case. *Cf. Shelton v. Tucker*, 364 U.S. 479, 486, 81 S.Ct. 247, 251, 5 L.Ed. 2d 231 (1960) (first amendment infringement found

because, in part, statute requiring disclosure did not keep information confidential); *Doe v. Martin*, 404 F.Supp. 753, 761-62 (D.D.C. 1975) (three-judge court) (disclosure limited to interested and affected agencies is "a lesser intrusion on privacy than reports made public to the world at large").

In sum, the Fund's evidence falls short of the "objective and articulable facts" necessary to satisfy either tier of *Brock's prima facie* test. The Fund established no causal nexus between the threatened enforcement of the subpoenas and a decline in contributions. Nor did the Fund tender evidence supporting a well-founded fear that disclosure of its contributor list to a narrow group of Department employees would discourage membership or substantially frustrate the organization's operations. Evidence arguing, rather than factually documenting, an alleged chill of associational freedom does not warrant quashing overwise legitimate administrative subpoenas.

II. *The Compelling Governmental Interest*

Because the Fund did not make out a *prima facie* case of first amendment infringement, this court need not decide if the subpoenas rationally promote a compelling governmental interest. A court "may not intervene in an

investigation, notwithstanding an allegation of interference with speech and associational rights, in the absence of a prima facie showing of actual past or threatened infringement." *McLaughlin*, 880 F.2d at 175.

CONCLUSION

We affirm the district court's order enforcing the subpoenas. The Fund failed to present *prima facie* evidence of a first amendment violation. The Fund has not causally correlated the threatened enforcement of the subpoenas with its decline in contributions or any other objective indicia of an associational chill. Nor has it demonstrated that it is the type of organization for which limited disclosure to a select group of government employees is anathema. The lack of evidence of a constitutional violation relieves the Department from the obligation to demonstrate that its subpoenas are narrowly tailored and rationally related to a compelling governmental interest.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

WILLIAM E. BROCK, Secretary of Labor; UNITED STATES DEPARTMENT OF LABOR, Plaintiffs, vs. LOCAL 375, PLUMBERS INTERNATIONAL UNION OF AMERICA, AFL-CIO, et al., Defendants.	No. A87-206 Civil ORDER (Subpoenas Enforced, Again)

This case grows out of the efforts of the Department of Labor ("the Department") to enforce administrative subpoenas directed against defendant Political, Educational, Legislative, Charity, and Defense Fund of Plumbers Local Union 375, AFL-CIO (a/k/a "Voluntary Fund", hereinafter "the Fund"). Defendants resist the Department's efforts.

In September of 1986, the Department commenced a compliance audit of Union Local 375. In the course of

the audit, plaintiffs' representatives became aware of the Fund. Union representatives voluntarily provided some information with respect to the Fund. It was learned, for example, that the Fund was created in 1974 or 1975 by a prior business manager of the union. It developed that the distribution of monies from the Fund was largely within the discretion of defendant Arsenault who serves both as the present business manager of the union and as the administrator of the Fund. Whether there were or were not standards by which contributions were made for the Fund was not developed. There is no evidence that the Fund has any separate legal existence. There is no evidence of the existence of a constitution, articles of incorporation, trust agreement, by-laws, charter, or other organic document. The Fund was in essence a checking account which defendant Arsenault controlled.

Revenues of the Fund appear to come from two sources: voluntary contributions and raffles. It is not clear whether the raffles are conducted by the union *per se*, or in the name of the Fund. There is evidence that some of the voluntary contributions to the Fund come from a "check-off" agreement, the form of which is before the court. Additionally, plaintiffs' auditors discovered that

substantial loans of union monies were made to the Fund. In particular, two loans of $10,000 each were made in January and February of 1981, and the same were repaid in November of 1981 and February of 1983, respectively. The Fund claims to be a labor organization for purposes of the Alaska Public Offices Commission which regulates political contributions, but it claims not to be a union fund for purposes of federal labor law.

Having developed as much information as they could on a voluntary basis, plaintiffs' auditors demanded the records of the Fund from defendants Arsenault and Cox who had the same. Production of the records was declined. Administrative subpoenas were issued and also declined. These proceedings followed in the form of a complaint for enforcement of the administrative subpoenas.

By its order of July 17, 1987, the court ordered enforcement of the subpoenas. Defendants appealed. The Ninth Circuit Court of Appeals reversed, holding that, irrespective of the court's findings as to the status of the Fund, first amendment associational rights of the Fund's contributors were implicated and entitled to protection. In this regard, the court of Appeals observed:

> If the Fund is sufficiently independent of the Union to be considered in its own right, it can attempt to show infringement of its members' first amendment rights. If the Fund is merely an extension of the Union, then the Union can make the attempt.

Brock v. Local 375, Plumbers International Union of America, AFL-CIO, 860 F.2d 346, 349 (9th Cir. 1988).

Addressing what should next happen in this court after remand, the court of appeals further observed:

> Our disposition of this issue, however, ... does not mean that appellants can escape lawful governmental investigation. Appellants must demonstrate to the district court, on remand, a "prima facie showing of arguable first amendment infringement ...." *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983). This *prima facie* showing requires appellants to demonstrate that enforcement of the subpoenas will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or "chilling" of, the members' associational rights. *O'Neal v. United States*, 601 F. Supp. 874, 878 (N.D. Ind. 1985).

Id. at 349-50 (footnote omitted). In the footnote to the above quoted text, the Ninth Circuit further addressed the

sufficiency of the showing to be required of defendants. In this regard, the court noted:

> A factor emphasized in each of [various decisions cited by the court] is the need for objective and articulable facts, which go beyond broad allegations or subjective fears.

Id. at n.l. Similarly, the court held that defendants' burden is to show a "reasonable probability" that disclosure of Fund documents will subject members or contributors to threats, harassment, or reprisals.

As a consequence of the mandate of the court of appeals, this court's order of July 17, 1987, was set aside. The court reactivated its normal case preparation procedures, and the parties ultimately agreed that, rather than have a trial or evidentiary hearing, the matter of the union or Fund contributors' first amendment rights and the matter of the existence of a compelling governmental interest in enforcement of the subpoenas would be submitted on affidavits or depositions. After numerous delays which the parties themselves initiated, the court received supplemental briefing from both sides, but only on the first issue above set out.

Defendants' brief in support of *prima facie* showing of first amendment infringement is supported by a supple-

mental affidavit from defendant Arsenault and copies of independent accountants' reports on the financial statements of the Fund for the years 1985 through 1988. Mr. Arsenault's affidavit also has appended to it several newspaper reports which appeared in Anchorage, Alaska, newspapers in May of 1987.

The significant information appearing in the accountants' reports has to do with Fund income. The financial reports of the Fund reflect the following:

Income Collected	1985	1986	1987	1988
Voluntary Contributions:	24,458	27,079	1,405	1,995
Raffle Income:	37,412	33,800	30,150	5,475
Permit Income:	*	*	0	613
Miscellaneous Income:	359	500	0	9

Exhibit 1 (pages 4 and 10) to defendants' brief in support of motion (Sept. 7, 1989).

The bulk of Mr. Arsenault's affidavit is unremarkable and irrelevant to the question of whether enforcement of the plaintiffs' subpoenas will lead to harassment, membership withdrawal, or discouragement of new members, or will lead to other consequences which

objectively impact or "chill" associational rights. The affidavit does reassert defendants' position that:

> [T]he Fund supports Union principles and goals but it is not derived in any manner from dues and fees of membership of the Union.

This assertion is patently false. Plaintiffs' investigation early on identified substantial intermingling of union monies with the Fund. Although characterized as "loans", and although repaid, defendants cannot escape the fact that union money has gone into the Fund in significant amounts and for significant periods of time.

Beyond the foregoing, Mr. Arsenault's six-page affidavit contains one paragraph, of approximately two-thirds of a page in length, which addresses the issue before the court. Mr. Arsenault states (page 6 of his affidavit):

> 14. That as a direct result of the action of the U.S. Department of Labor in attempting to gain contribution lists, the Voluntary Fund has, for all intents and purposes, ceased to exist. Little or no contributions have been received. I am attaching copies of the audited financial statements. In 1985, the Fund received $62,229 in income. In 1988, the Fund received $8,092. Contributions to the Fund have virtually dried up

> because of the controversy surrounding the Fund and particularly the potential disclosure of the names of the individuals desiring to support the goals of the Voluntary Fund. As a result, the Fund has not been able to pay its attorney's fees in defending itself from this attack by the U.S. Department of Labor. For all intents and purposes, because of the actions of the U.S. Department of Labor in seeking the records of this Fund, the Fund has ceased to exist as a viable entity for the purposes of making political, educational, legislative, charitable and union goal-oriented expenditures.

Stripped to its essentials, Mr. Arsenault's affidavit contends that the Fund has received little or no contributions and has in substance ceased to exist. The affidavit avers that this has happened "because of the controversy surrounding the Fund and particularly the potential disclosure of the names of [contributors]."

As demonstrated by the summary of Fund receipts, it cannot be denied that there has been a dramatic decrease in contributions to the Fund since the commencement of plaintiffs' investigation. Plaintiffs speculate that the downturn in the economy of Alaska is the explanation. That explanation may or may not be factual. Undeniably, there has been a tremendous downturn in the

economy of the State of Alaska over the period addressed by the financial information before the court. However, plaintiffs have offered no evidence to support their speculation that the downturn in the economy has directly impacted the Fund's receipts.

Nevertheless, defendants' explanation of what has happened is no better than plaintiffs'. Mr. Arsenault makes the bald assertion that contributions to the Fund have "dried up because of the controversy surrounding the Fund ...." He states nothing more than an opinion--his conclusion. He states no facts in support of the opinion that contributions have ceased because of the possibility of disclosure. While the risk of disclosure could certainly be an explanation of the downturn in contributions, there is another, equally plausible explanation--namely, a deliberate decision on the part of Mr. Arsenault and/or the membership of defendant union to cease working through the Fund because of the investigation.[5]

---

[5] It has not escaped the court's attention in this regard that a major source of income to the Fund during the years 1985 through 1987 was the conduct of raffles. In 1987, the union still derived over $30,000 from this source. The raffle "prizes" cost $14,500 in 1987, and $20,000 for each of 1985 and 1986. No money shows as being dis-

Conspicuously absent from Mr. Arsenault's affidavit are any articulable facts which tend to support the contention that Fund revenues have diminished because of the "chilling effect" of the plaintiffs' investigation. Similarly, there is not a shred of evidence in Mr. Arsenault's affidavit of any form of harassment. No mention is made of membership (new or old) in the union. While we are, no doubt, supposed to infer that there has been a decrease in membership in the Fund because of the decrease in voluntary contributions, in fact Mr. Arsenault makes no mention of past, present, or future membership in the Fund. The court infers that "membership" per se in the Fund is not really a matter of significance. Rather, the significant point is the size of contributions to the Fund by whomever. These have obviously diminished substantially, but the court has no factual information as to why.

---

bursed for "prizes" in 1988. From this fact, the court infers that no raffle was held in 1988. Naturally, raffle income decreased dramatically in 1988. It strikes the court as highly improbable that this decrease in income is in any fashion attributable to plaintiffs' investigation. The loss of raffle income amounts to approximately fifty percent of the loss of revenues to the Fund.

While the court suspects that this entire matter is much ado about very little, the Department of Labor has a job to do, and this court has an obligation to assist the Department of Labor in doing its job. It is crystal clear in this instance that defendant union has sponsored, and that its business manager or financial secretary-treasurer has administered on a discretionary basis, a fund of money which from time to time has included union funds. Although the parties have refrained from addressing the question regarding the existence of a rational connection between the records sought and a compelling government interest, the court does not doubt that there is a legitimate government interest in ascertaining how the Fund was used.

The court would have no hesitation in protecting first amendment rights were it to be demonstrated that such rights were truly at risk here, but neither the union nor the Fund has made the requisite showing. The showing of the union and the Fund is conclusory and speculative. There is no factual, objective demonstration that there has been or is likely to be harassment or membership withdrawal because of the enforcement of the subpoena. Undeniably, there has been a change in the

Fund, but defendants have simply left the court to speculate about why that change took place: and the court concludes that the most likely explanation is the defendants' voluntary decision to collect and distribute political contributions through some vehicle other than the bank account which is the Fund.

IT IS HEREBY ORDERED: That defendants Arsenault and Cox shall give testimony and produce documents pursuant to the subpoenas served upon them by the Department of Labor at a time and place to be designated by the Department of Labor on reasonable notice.

DATED at Anchorage, Alaska this 6 day of December, 1989.

H. Russel Holland
United States District Judge